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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM F. GLOVER,
Petitioner,

vs.

McDONNELL DOUGLAS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals used the wrong legal standard, in light of *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 (1993), in assessing the sufficiency of the evidence to support an award of liquidated damages under the Age Discrimination in Employment Act and an award of punitive damages under the Missouri Human Rights Act?

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OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on December 16, 1992, is officially reported at 981 F.2d 388 (8th Cir. 1992). A copy of the Opinion is reproduced in Appendix A.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on December 16, 1992. Plaintiff Glover filed a petition for rehearing by the panel or, alternatively, for rehearing en banc. The Court of Appeals denied the petition, with one judge dissenting, on April 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED

The liquidated damages provision of the Age Discrimination in Employment Act provides as follows:

> Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter.

See 29 U.S.C. §626(b). The punitive damages provision of the Missouri Human Rights Act provides as follows:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages. . . .

See Section 213.111.2 R.S.Mo. 1986.

STATEMENT OF THE CASE

The Petitioner, plaintiff William Glover, worked in the Accounting Department of the Respondent, defendant McDonnell Douglas Corporation. Several years ago, the company consolidated three of its subsidiaries. As a result of the consolidation, jobs were eliminated. Joseph Barbeau, the company manager in charge of the newly consolidated Accounting Department, was told to select three people in his department for termination. He selected three employees, all of them over the age of 40. One of them was Mr. Glover. At the time, Mr. Glover was 59 years of age. He was the oldest employee in the Accounts Payable Section of the Accounting Department and the one with the most seniority, over 20 years.

Mr. Barbeau was free to select any three employees in the Accounting Department for termination. However, job perfor-

mance and years of service were supposed to be key factors in determining who would stay and who would go. Armed with these criteria, Mr. Barbeau proceeded to do some very strange things. He selected Mr. Glover for termination and saved several younger employees in the department who had less ability and less seniority than Mr. Glover.

Mr. Glover's job performance with the company was competent and satisfactory. He had never been disciplined or told his job was in jeopardy. On the contrary, he had been told repeatedly that his job performance was "good." Indeed, his performance evaluations in the four years preceding his termination were positive. Moreover, he had over 20 years of seniority with the company. Nevertheless, he was let go in favor of much younger coworkers in the Accounting Department who were less qualified and had less seniority. In particular, he was selected over one co-worker, 23 years old, who had been employed with the company less than 3 years; a second co-worker, 31 years old, who had less than 1 year experience as a regular full time employee; a third co-worker, 33 years old, who had less than 1 year of experience with the company; and a fourth co-worker, 24 years old, who had less than 2 years of experience with the company. Significantly, the 24 year old employee was a poor performer; according to Mr. Barbeau she was a "recent disappointment." This employee, unlike Mr. Glover, received sharply negative job evaluations which documented numerous deficiencies in her job performance. Moreover, the 33 year old employee ranked *below* Mr. Glover on the company's "totem pole" which listed employees in order of their job performance and value to the company. Merit and seniority were supposed to determine who did, and who did not, survive the reduction in force. The fact that Mr. Barbeau departed from these criteria in selecting Mr. Glover for termination constituted compelling circumstantial evidence of age discrimination.

There was also direct evidence of intentional age discrimination. Mr. Barbeau's handwritten notes show that he went out of

his way to record the ages of many of the employees he was considering for termination. According to Mr. Barbeau, he did this because his superiors needed the information to review the lawfulness of his decisions. However, there was no evidence that Mr. Barbeau's superiors asked him to record the ages of employees or that they in any way used the information he recorded to evaluate the lawfulness of his decisions. Thus, it was a reasonable inference that Mr. Barbeau recorded the information for the illegitimate purpose of facilitating discrimination on the basis of age. Moreover, it is important to note that Mr. Barbeau's handwritten notes reflect the notation "young, more potential" next to the name of Laura Pund, age 27, who was saved from termination. This age-related comment was direct evidence of Mr. Barbeau's preoccupation with age. It showed that he wanted to retain younger employees, like Ms. Pund, rather than older employees, like Mr. Glover, because the younger employees had a longer future with the company.

Perhaps the most compelling direct evidence of intentional age discrimination, however, was what happened shortly after Mr. Glover was informed of his termination. In an effort to obtain alternative employment within the company, Mr. Glover telephoned Jim Cleeton, the Branch Manager of Accounting in the company's MAC-Air Division, and asked him about job possibilities in his department. Mr. Glover wanted a job in that Division comparable to the one he had just lost. Mr. Cleeton replied "Bill, your folder has come around into our department" and then said:

> Bill, I don't want to make you [mad], but your age is against you . . . the company's on our back to hire younger people with fresh and new ideas. The older people that I've got in my department I'm having to move around.

Mr. Cleeton refused to share with Mr. Glover the qualifications for the posted job vacancy.

Defendant McDonnell Douglas knew it was wrong under the law to fire Mr. Glover, and refuse to reassign him to another position in the company, on account of his age, 59. Significantly, Mr. Barbeau was briefed on the prohibitions of the Age Discrimination in Employment Act (ADEA) before he selected Mr. Glover for termination in the reduction in force. His handwritten notes show a sophisticated understanding of the statute. For example, his notes distinguish between "disparate treatment" and "disparate impact" cases under the ADEA. Moreover, it is important to note that Mr. Cleeton *denied* telling Mr. Glover, when he turned him down for alternative employment, that "his age was against him." Mr. Cleeton would not have denied making this statement unless he knew that what he told Mr. Glover was wrong under the law.

Plaintiff Glover filed this lawsuit alleging that he was the victim of age discrimination in violation of the ADEA and the analogous Missouri Human Rights Act (MHRA). After hearing four days of testimony, the jury agreed with Mr. Glover and awarded him $30,000 in back pay. The jury found the violation to be "willful" so Mr. Glover was awarded $30,000 in additional liquidated damages under the ADEA. Also, the jury awarded Mr. Glover $100,000 in punitive damages under the MHRA. On appeal, the Eighth Circuit Court of Appeals affirmed the jury's finding of intentional age discrimination. The Court noted that Mr. Glover produced direct, as well as circumstantial, proof of age discrimination by McDonnell Douglas. Accordingly, it affirmed the award of $30,000 in back pay. *See* Appendix A at A6-A9.

At the same time, however, the Court of Appeals reversed the award of $30,000 in liquidated damages under the ADEA and the award of $100,000 in punitive damages under the MHRA. According to the Court, there was insufficient evidence, as a matter of law, to show that McDonnell Douglas possessed the requisite culpable state of mind to justify the awards against it.

The Court was not impressed with the evidence showing that McDonnell Douglas knew its conduct was unlawful. According to the Court, "additional evidence" was needed to justify the awards. The Court concluded there was no such "additional evidence" in this case. *See* Appendix A at A14 and A15.

Plaintiff Glover filed a petition for rehearing by the panel or, alternatively, for rehearing en banc. The Eighth Circuit denied the petition, with Judge McMillian dissenting, on April 5, 1993. Two weeks later, the U.S. Supreme Court decided *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 (1993). In *Biggins*, the Supreme Court overruled Eighth Circuit caselaw on liquidated damages. The Court ruled that when an employer does what it knows the ADEA prohibits liquidated damages can be awarded against it. *Id.* at 1708-1710. Significantly, the Court rejected the notion, endorsed by the Eighth Circuit, that "additional evidence" is needed to justify such an award. *Id.* at 1709. After *Biggins* was decided, plaintiff Glover filed this petition for a writ of certiorari with the Supreme Court.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, distinguishes between "intentional" and "willful" violations of the statute. A violation is "intentional" if the employer deliberately treats an older employee adversely on account of his age. Proof of intentional discrimination entitles the employee to an award of back pay. A violation is "willful" if, in addition to deliberately treating the older employee adversely on account of his age, the employer knows it is wrong under the law to deliberately treat the employee adversely on account of his age. *See Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125-129 (1985). Proof of willful discrimination entitles the employee to an award of liquidated damages. Here, the Court of Appeals vacated the award of $30,000 in liquidated damages under the ADEA asserting that plaintiff Glover was the victim of "intentional" but not "willful" age discrimination by defendant McDonnell Douglas Corporation. In so ruling, the Court imposed a heavier burden of proof on Mr. Glover than was warranted by law. As a result, its decision cannot be allowed to stand.

The *Thurston* standard, which governs an award of liquidated damages under the ADEA, is simple and straightforward. A violation is "willful" if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *See Thurston, supra,* 469 U.S. at 128. The standard is not a difficult one to meet. All the plaintiff need show is that the defendant employer, who has intentionally discriminated against him, knew its conduct was unlawful under the statute. The Court of Appeals, however, refused to apply the *Thurston* standard in this case. The Court was worried by the fact that virtually every employer knows, over 25 years after Congress enacted the ADEA, that it is unlawful to treat an older employee differently on account of his age. A literal application of the

Thurston standard in disparate treatment cases, where the employer intentionally treats an older employee differently on account of his age, would lead to an almost automatic award of liquidated damages in such cases. The Court did not like this result because it thought it was contrary to certain language in *Thurston*.

In *Thurston*, the Supreme Court observed that Congress intended to create a "two-tiered liability scheme" under which some but not all ADEA violations would give rise to liquidated damages. 469 U.S. at 128. In order to maintain this two-tiered liability scheme, the Eighth Circuit reformulated the *Thurston* standard to require a higher level of proof of willfulness. Under its revised standard, the Eighth Circuit made it substantially more difficult for a victim of age discrimination to recover an award of liquidated damages:

> Because *Thurston* makes clear that we must interpret the liquidated damages provisions in a way that would not permit an award of double damages in almost every case, we must seek a standard for willfulness that distinguishes between a violation, which is almost always intentional, and a willful violation, leading to double damages.... [I]n order that the liquidated damages be based on evidence that does not simply duplicate that needed for the compensatory damages, there must be some *additional evidence* of the employer's reckless disregard.

Bethea v. Levi Strauss & Co., 827 F.2d 355, 359 (8th Cir. 1987) (quotation marks and citations omitted) (emphasis added). In the present case, the Court of Appeals assessed the evidence under the stringent "additional evidence" standard rather than the lenient *Thurston* standard. *See* Appendix A at A13.

The Eighth Circuit has never clearly defined what constitutes "additional evidence" sufficient to justify a liquidated damages award. In some cases, it has suggested that direct evidence of the

underlying age discrimination will suffice; in other cases, it has suggested that direct evidence alone will not suffice. *Cf. Neufeld v. Searle Laboratories,* 884 F.2d 335, 340 (8th Cir. 1989) with Appendix A at A13. In *Bethea*, the leading case on the topic, the Court suggested there must be proof of "outrageous" conduct by the employer. 827 F.2d at 359. Since it cited *Bethea* with approval, the Court of Appeals may have required such proof in this case. *See* Appendix A at A13. The overall tenor of its opinion suggests that it was looking for evidence of extraordinary misconduct on the part of McDonnell Douglas.

In any event, the Eighth Circuit has clearly required something more than mere knowledge on the employer's part that its conduct is unlawful under the ADEA. The "something more" requirement is necessary, it has said, to keep plaintiffs who prove intentional discrimination from automatically recovering liquidated damages in almost every case. This result, it thought, must be avoided at all costs. Thus, the Eighth Circuit has refused to apply the *Thurston* standard as articulated by the Supreme Court. Instead, it has applied its own "additional evidence" standard which is considerably more stringent. All the while it has insisted it was applying the *Thurston* standard as the Supreme Court intended it to be applied. *See generally Brown v. Stites Concrete, Inc.,* Nos. 91-2581 and 91-3057 (8th Cir. June 10, 1993) (en banc) (collecting and analyzing Eighth Circuit caselaw) reproduced in Appendix B at A17-A31.

The Eighth Circuit's approach runs headlong into *Hazen Paper Co. v. Biggins,* 113 S.Ct. 1701 (1993). In *Biggins*, the Supreme Court reaffirmed the *Thurston* standard of willfulness as originally formulated. Evidence that the employer knew its conduct was prohibited by the ADEA is sufficient, without more, to justify an award of liquidated damages:

> It would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer

> more likely knows its conduct to be illegal, knowledge alone does not suffice for liquidated damages.

113 S.Ct. at 1710. The Court expressed surprise that several federal appellate courts, including the Eighth Circuit, misinterpreted the *Thurston* standard. *Id.* at 1709. The Court found their concern for maintaining a two-tiered liability scheme to be "misplaced." *Id.* The Court emphasized the fact that, while the *Thurston* standard might lead to an award of liquidated damages in most ADEA cases, it would not lead to an award of liquidated damages in all ADEA cases. In a narrow range of cases, liquidated damages would be denied:

> The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a "bona fide occupational qualification" defense, . . . and exempts certain subject matters and persons.... [In addition], if an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.

Id. The relevant question in each case is whether the employer knew its discriminatory conduct was prohibited by the statute. *Id.* at 1710. "Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision." *Id.*

The Eighth Circuit, sitting en banc, has recently acknowledged that *Biggins* has "severely undercut" and "overruled" its prior caselaw on liquidated damages. *See Brown v. Stites Concrete, Inc., supra,* Appendix B at A21 and A25. In *Brown*, the Eighth Circuit admitted it has been using the wrong standard of proof for liquidated damages in ADEA cases; indeed, it admitted

it used the wrong standard of proof in this very case. *Id.* at A24. The error cannot be said to be harmless.

There is no doubt that McDonnell Douglas knew it was unlawful under the ADEA to fire Mr. Glover, and refuse to reassign him to another position in the company, because of his age. As discussed, there was substantial probative evidence in the record to support this conclusion. *See* Statement of the Case at p. 5. Moreover, McDonnell Douglas has never suggested that if it discriminated against Mr. Glover it did so in the good faith belief that the ADEA permitted such discrimination. Such a suggestion would be completely untenable. "There is no logical way to square a finding of intentional discrimination with a finding of good faith on the employer's part." *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1100 (11th Cir. 1987). Thus, it is clear that Mr. Glover is entitled, under the *Thurston* standard, to keep the jury award of $30,000 in liquidated damages. The Court of Appeals took it away from Mr. Glover because it mistakenly thought that "additional evidence" was needed under the *Thurston* standard; it ruled that there was no such evidence in this case. *See* Appendix A at A13-A14. We know now, after *Biggins*, that "additional evidence" is not required.

In short, the Court of Appeals viewed the evidence in this case through the prism of the wrong legal standard. It misunderstood and misapplied the *Thurston* standard. In particular, it imposed a heavier burden of proof on Mr. Glover than was warranted under *Thurston*. The Supreme Court cannot say, with any degree of assurance, that the Court of Appeals would have reached the same result had it used the proper legal standard. On the contrary, it might have reached a different result. Under the circumstances, the Supreme Court should grant certiorari, vacate the judgment of the Court of Appeals, and remand the case for further consideration in light of *Biggins*. *See Wilson v. Seiter*, 111 S.Ct. 2321, 2328 (1991); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989).

Defendant McDonnell Douglas may seek to avoid this disposition of the case by pointing to a footnote in the Court of Appeals' opinion. In the footnote, the Court observed that regardless of how *Biggins* was ultimately decided, "our decision today will be unaffected; if *Thurston* continues to apply, the law — and our decision — will be unchanged." *See* Appendix A at A14 n. 2. But the lower court's understanding of the law in general, and *Thurston* in particular, was deeply flawed. The Court of Appeals labored under the misconception, which stemmed from its prior caselaw, that the Supreme Court was hostile to any interpretation of the term "willful" that would result in an award of liquidated damages in most cases of intentional age discrimination *See* Appendix A at A13, citing *Bethea, supra,* 827 F.2d at 359. In reality, of course, the Supreme Court is not hostile to such an interpretation; it has explained it is the natural consequence of the way Congress wrote the statute. The Court of Appeals should be given the opportunity to reassess the evidence in this case free of its fundamental misconception about the Supreme Court's attitude toward liquidated damage awards. Without doubt, it would benefit from reading the Supreme Court's decision in *Biggins* as well as the Eighth Circuit's recent en banc decision in *Brown* which analyzes it. A fresh look at the evidence, guided by these two judicial decisions, may very well lead to a different result in this case. Any doubt about the matter must be resolved in Mr. Glover's favor. *See Wilson v. Seiter,* 111 S.Ct. 2321, 2328 (1991).

The Court of Appeals also erred in setting aside the jury award of $100,000 in punitive damages under the Missouri Human Rights Act. Mr. Glover should be allowed to keep this award. The Missouri Human Rights Act is modeled on federal civil rights legislation, including the ADEA, and must be construed in conformity with it. *See Koszor v. Ferguson Reorganized S.D. R-2,* 849 S.W.2d 205, 207 (Mo. App. 1993). Punitive damages can be awarded under the state statute when the defendant "knew his

act was wrong at the time he did it." *Burnett v. Griffith*, 679 S.W.2d 780, 788 (Mo. banc. 1989). Here, McDonnell Douglas clearly knew it was wrong to intentionally discriminate against Mr. Glover on account of his age. Nevertheless, the Court of Appeals set aside the punitive damages award because "as with the award of double damages under the federal law, the state law requires a showing beyond the minimum necessary to establish the violation." *See* Appendix A at A15. Significantly, no authority was cited in support of this proposition. The Court of Appeals' interpretation of state law was influenced by, indeed tainted by, its misinterpretation of federal law. Accordingly, it should be re-examined upon remand. *See Rayonier Incorporated v. United States*, 352 U.S. 315, 320-321 (1957).

CONCLUSION

For the reasons discussed, Mr. Glover asks the Supreme Court to grant his petition for certiorari, vacate the judgment of the Court of Appeals, and remand the case for further consideration in light of *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701(1993).

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1059EM

William F. Glover,
Plaintiff-Appellee,

v.

McDonnell Douglas Corp.,
Defendant-Appellant.

Appeal from the Unites States District Court
for the Eastern District of Missouri.

Submitted: September 17, 1992
Filed: December 16, 1992

Before BEAM, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

McDonnell Douglas Corporation ("McDonnell Douglas") appeals the jury's verdict in favor of William Glover on his claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1988) and its awards of emotional distress, liquidated, and punitive damages. We affirm in part, reverse in part, and remand.

I. BACKGROUND

A. The Layoff

In the middle of 1987, McDonnell Douglas responded to declining business by consolidating its Astronautics, Electronics, and Microelectronics subsidiaries. The company deter-

mined that, as a result of the consolidation, approximately 120 jobs would have to be eliminated. Most of these jobs were eliminated when McDonnell Douglas instituted a voluntary severance program, but the program fell short of its goal, resulting in the need to lay off nineteen individuals.

Joseph Barbeau, the person in charge of the newly consolidated accounting department, was told that he had to select three people to be laid off. In February 1988 Barbeau selected the three employees, including Glover. Glover was fifty-nine years old and had worked for the Astronautics subsidiary for over twenty years. Glover had a BA degree and an associates degree but did not have a degree in accounting. His job was that of a "processor" in the Accounts Payable Section; his duties consisted primarily of reviewing invoices to insure they complied with the company's purchase orders. Glover sued McDonnell Douglas, alleging he had been selected for termination based on his age and was denied consideration for reassignment to another subsidiary based on his age.

B. The Trial

In outlining the evidence presented at trial, we find it more expedient to discuss McDonnell Douglas' evidence first. Barbeau testified that he began working for the Astronautics division in the summer of 1987. In the middle of January, 1988, Barbeau was told that three people would have to be laid off, but he was not told how to go about selecting those three people. He was permitted to chose any three employees, whether they were salaried or hourly, full-time or part-time. In making his determination, he relied on the company's "totem poles." The totem poles listed employees, with the better performers and most valuable employees being listed closer to the top. Totem poles were generated annually by each subsidiary and used as, among other things, a factor in awarding merit raise. In determining who was to be laid off, Barbeau obtained the totem poles for each

newly consolidated subsidiary from 1985, 1986, and 1987. During these three years, all three subsidiaries utilized separate poles for salaried and non-salaried employees. On the Astronautics' subsidiary's totem pole for 1987, Glover ranked 42 out of 42 salaried employees; in 1986, he was ranked 39 out of 43; and in 1985, he ranked 30 out of 52. Barbeau testified that if salaried and hourly employees were combined on one totem pole, Glover would have ranked 57 out of 61 in 1987. From the totem poles, Barbeau created a list of employees that had consistently ranked near the bottom in the preceeding [sic] three years. He then began acquiring other information about the employees by talking to other supervisors. Barbeau wrote some (but not all) of this information down; included in this information was the statement that one of the employees on his list was "young" and had "more potential." After conversing with the other supervisors, Barbeau created a preliminary list of approximately fifteen candidates for layoff and ranked the top six; Glover was ranked as the second candidate.

Barbeau then consolidated much of his previously collected information and added information reflecting each employee's age, years of service, and absentee record. On approximately January 18, he discussed the information with his staff, whereupon it was decided that Glover should be among those laid off. Barbeau prepared yet another, more detailed copy of his information and had two further discussions with representatives from McDonnell Douglas' legal and human relations departments. At these meetings, Barbeau was told that if all things were equal between two or more likely candidates, years of service could be considered (with greater seniority being rewarded). He was also given some basic information about the ADEA.

Glover testified that he inquired about moving to McDonnell Douglas' Aircraft subsidiary, and to that end spoke with Jim Cleeton. Glover testified that Cleeton told him he would not be considered because of his age. Cleeton testified and denied

making this statement. Glover also testified about his experiences in finding another job, and that the combination of being laid off and the menial nature of his new job caused him to experience disruptive sleep habits, a diminished desire for food, and a degree of humiliation sufficient to prevent him from socializing as much as he had before being laid off.

Also testifying on Glover's behalf were four other employees in accounts payable. All four were significantly younger than Glover, were hourly employees, and had less education and experience. One of these employees had received particularly critical job appraisals, and another ranked below Glover on the combined totem pole; no information was provided about the other employees' job performance or their positions on any totem poles. None of these employees was laid off in February of 1988. Because these processors were hourly employees, they did not appear on the same totem poles as Glover, who was a salaried employee. We will discuss more of the evidence presented at trial during our discussion of the issues.

The jury returned a verdict in Glover's favor and awarded him $30,000 in backpay, $100,000 in emotional distress damages, and $100,000 in punitive damages. The jury found the violation to be willful, and the district court accordingly awarded Glover an additional $30,000 in liquidated damages. The court also granted Glover equitable relief in the form of reinstatement and pension credit. McDonnell Douglas appeals.

II. DISCUSSION

A. Standard of Review

Our standard of review is well established. When reviewing a district court's denial of a motion for judgment notwithstanding the verdict, we must

> 1) consider the evidence in the light most favorable to [Glover], who prevailed with the jury; 2) assume that all

> conflicts in the evidence were resolved by the jury in [Glover's] favor; 3) assume as proved all facts which [Glover's] evidence tends to prove; 4) give [Glover] the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and 5) affirm the denial of the motion if reasonable persons could differ as to the conclusions to be drawn from it.

Gilkerson v. Toastmaster Inc., 770 F.2d 133, 136 (8th Cir. 1985). McDonnell Douglas, however, relies on a footnote in *Dace v. ACF Indus., Inc.*, 722 F.2d 374 (8th Cir. 1984) to argue that a standard of review less favorable to Glover should be used. In the relevant footnote, we theorized that "[i]f, for example, the moving party's evidence is completely disinterested, uncontradicted, and unimpeached, . . . some modification of the general rule may be called for." *Id.* at 377 n.6. We went on to explain that if the witness had an interest in the result of the lawsuit, the credibility of that witness was a matter best determined by a jury. *Id.*

Dace does not justify altering the standard of review in this case. First, all of McDonnell Douglas' testimony came from its employees, all of whom have an interest (even if not pecuniary) in this case. Therefore, we cannot fairly characterize their testimony as "completely disinterested." Second, the only evidence that can fairly be described as unimpeached and uncontradicted was the fact that McDonnell Douglas was experiencing a decline in business, which necessitated the need to eliminate some employees. Even if *Dace* were to apply, it does not require all evidence --even that which was contradicted and impeached — to be viewed in McDonnell Douglas' favor. Because the evidence regarding Glover's claims is not the type described in *Dace*, we will apply the traditional standard of review.

B. Sufficiency of the Evidence

This case proceeded to trial, and the jury found that McDonnell Douglas discriminated against Glover because of his age. Consequently, we need only examine the record and determine whether there was sufficient evidence to support the jury's finding that McDonnell Douglas intentionally discriminated against Glover; we do not concern ourselves with determining whether the various burdens of proof that must be met at the preliminary stages were satisfied by the parties. *E.g., Hall v. American Bakeries Co.*, 873 F.2d 1133, 1135 (8th Cir. 1989). Given the standard of review governing this issue, *see* part II.A, *supra*, we conclude there was sufficient evidence to support the jury's verdict, although concededly this presents a close case.

When viewed in the light most favorable to Glover, the jury was justified in finding that, though business conditions were such that McDonnell Douglas was justified in laying off some of its employees, Glover was selected to be one of those laid off because of his age. Barbeau was not given any criteria to determine who should be laid off until after he had made his preliminary determinations, and even then the guidelines with which he was provided were rather sketchy. Barbeau asserted that Glover was selected because of his low ranking on the totem pole, but Glover presented evidence that younger employees who ranked lower (or as low) on the totem pole were not considered for termination even though they could have been laid off in Glover's place. This indicates that Barbeau did not apply his self-imposed standards when he selected Glover. The jury could also question the content and value of the information supplied by the other supervisors because they testified that they had little or no personal experience with Glover, and most of them testified they either had no opinion about Glover or they could not recall what their opinion was. One supervisor testified that he recorded the candidates' ages, but did not know why he did so. Similarly, Barbeau wrote down the candidates' ages; he

indicated he did so because the information would be needed when the ultimate decision was reviewed. However, there is no indication as to how this information was actually used in any review and, given that Barbeau was given no directions on how to select the three people to be laid off, it is not clear how he knew this information would be needed. Finally, Glover testified that Cleeton told him he would not be considered for a job because of his age. If believed by the jury, these comments were sufficient to allow the jury to conclude that McDonnell Douglas was more interested in employing young employees than old employees, and was certainly sufficient to sustain the jury's determination that Glover was not rehired because of his age.

McDonnell Douglas' arguments fall into three main categories. The first category consists of a variety of arguments explaining why the evidence is insufficient. We will neither list nor discuss each of them individually; instead, we will simply note that it is the jury's function to consider the competing evidence, as well as the competing views of that evidence. In rendering its verdict, the jury afforded greater credit to Glover's view of the facts, and we cannot change the outcome simply because McDonnell Douglas is able to present a different view of the facts. *See Morgan v. Arkansas Gazette*, 897 F.2d 945, 951-52 (8th Cir. 1990).

The second argument focuses on the fact that McDonnell Douglas was instituting a reduction in force that was necessitated by legitimate business concerns. While this is true, the fact that Glover was terminated as part of a reduction in force does not automatically bar his claim of age discrimination. The reduction in force meant that somebody would be laid off, but the decision as to who was to be laid off could not be made on the basis of age. *See Hillebrand v. M-Tron Indus.. Inc.*, 827 F.2d 363, 367 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989) (quoting *Christie v. Foremost Ins. Co.*, 785 F.2d 584, 587 (7th Cir. 1986)). McDonnell Douglas contends Glover failed to make the addi-

tional showing of age discrimination required in reduction in force cases. *See Holley v. Sanyo Mfg. Inc.*, 771 F.2d 1161, 1166 (8th Cir. 1985). We disagree; keeping in mind that direct evidence is not necessary, *id.*, we note that Cleeton's statements combined with the circumstances indicating Barbeau was not completely faithful to his own criteria serves as the necessary additional showing. More importantly, however, is the fact the additional showing requirement is part of the prima facie case, *id.* at 1165; as we have already noted, this case went to trial before a factfinder, and on appeal we do not focus on whether the prima facie case was made. *See Hall*, 873 F.2d at 1135.

McDonnell Douglas' final argument concerns the use of Barbeau's and Hudson's recording of the employees' ages. McDonnell Douglas contends we have previously held that such acts are not evidence of age discrimination. A close examination of the cases upon which the appellant relies demonstrates we have not enunciated such a general proposition. In *Smith v. Goodyear Tire & Rubber Co.*, 895 F.2d 467 (8th Cir. 1990), the plaintiff's supervisor had included the plaintiff's age in an evaluation devoted primarily to another employee *Id.* at 472. We stated that "*[o]n the facts of this case,* we believe this single reference to age is insufficient evidence of Goodyear's intent to discriminate." *Id.* (emphasis added). By its own terms, the statement does not purport to set forth a general rule of law. In *Goetz v. Farm Credit Servs.*, 927 F.2d 398 (8th Cir. 1991), we noted that "[s]ome companies facing a reduction in force situation initiate some kind of plan in which objective criteria are used to determine . . . the effect of layoffs on protected groups." *Id.* at 403 n.2. This does not insulate every instance in which an employer takes special note of its employees' ages. While an employer could note its employees' ages for the legitimate purpose identified in *Goetz*, an employer could also note its employees' ages for the illegitimate purpose of facilitating discrimination on the basis of age. Whether the purpose for the notation is legitimate or not is for the jury to decide; in this case,

we note that Hudson had no reason for writing down the employees' ages, and there was no indication the information was used by anybody to conduct the analysis described in *Goetz*. Thus, the jury was justified in inferring the ages were not used for legitimate reasons.

In conclusion, we reiterate our belief that this is an extremely close case. McDonnell Douglas presented evidence that Glover was not among the company's best performers. On the other hand, Glover presented evidence (particularly, testimony relating to his attempt to secure a job elsewhere in the company) indicating age-based animus existed. Sharply contrasting testimony was presented to the jury, and the jury chose to believe Glover; there is nothing in the record that demonstrates, as a matter of law, this decision was improper or unfounded. The jury simply found Glover to be more credible, and we cannot disturb this determination on appeal.

C. Jury Instructions

The district court instructed the jury that it should find for Glover if it found

> First, that plaintiff has proved that his age was, more likely than not, a motivating factor in defendant's decisions as to discharge and/or re-employment; and second, that defendant has failed to prove that plaintiff would have been discharged and/or not re-employed regardless of his age. In showing that plaintiff's age was a motivating factor, plaintiff is not required to prove that his age was the sole motivation or the primary motivation for defendant's decision as to discharge and/or re-employment.

This instruction is based on the Supreme Court's plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse* applies to mixed-motive cases; that is, "cases in which the employer had both legitimate and illegitimate

reasons for its actions." *Gray v. University of Ark. at Fayetteville*, 883 F.2d 1394, 1398 (8th Cir. 1989). If direct evidence of age discrimination has been presented, the *Price Waterhouse*-based instruction may properly be given. *Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991). Once the plaintiff presents evidence that age was a motivating factor in the employer's decision, the employer "'may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [illegitimate criterion] into account.'" *Id.* (quoting *Price Waterhouse*, 490 U.S. at 258). McDonnell Douglas contends the "mixed motive" instruction should not have been given and, even if it was proper in this case, it is improperly worded. We reject both contentions.

As a general rule, we would expect that all successfully prosecuted age discrimination cases involving a reduction in force would involve mixed motives because the plaintiff would be alleging the employer had both a legitimate reason (the economic need to reduce the workforce) and an illegitimate reason (to terminate an employee based on his or her age). As we have already noted, a plaintiff terminated as a result of a reduction in force must present additional evidence to demonstrate an impermissible factor was used to select him or her for termination; more likely than not, this extra showing will qualify as direct evidence sufficient to trigger the *Price Waterhouse* analysis.

We prove this point by using this case as an example. For purposes of triggering the *Price Waterhouse* analysis, direct evidence may consist of "actions or remarks of the employer that reflect a discriminatory attitude," *Beshears*, 930 F.2d at 1354 (quoting *Gray*, 883 F.2d at 1398), or comments made by individuals that are closely connected to the decisionmaking process. *Id.* As discussed earlier, Barbeau's and Hudson's recording of the candidates' ages could be interpreted as an action designed to facilitate discrimination on the basis of age. Furthermore,

Cleeton's statements demonstrate the reduction in force was designed, in part, to eliminate older employees and certainly demonstrates the decision not to reassign Glover was motivated by discriminatory purposes. Thus, direct evidence was offered, and the use of the *Price Waterhouse* analysis was not improper.

McDonnell Douglas next argues that even if the *Price Waterhouse*-based instruction was appropriate, it was improperly worded in that it permitted Glover to prevail if he proved that his age was a "motivating factor," instead of a "substantial factor," in McDonnell Douglas' decision to lay him off. Despite McDonnell Douglas' contentions, we do not believe *Price Waterhouse* mandates one wording or the other. It is true that the *Price Waterhouse* plurality expressed the standard in terms of a "motivating" factor, *e.g.*, 490 U.S. at 258, whereas the concurring opinions used the term "substantial." *E.g.*, *id.* at 259 (White, J., concurring); *id.* at 265 (O'Connor, J., concurring). Nonetheless, the differences in the views expressed in the plurality, the two concurrences, and the dissent do not center on which word should be used, rather, the Justices differed as to whether a new analytical framework was needed for mixed-motive cases. *See id.* at 246-47 (plurality opinion); *id.* at 287 (Kennedy, J., dissenting). Indeed, the dissent recognized that "[d]iscrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i.e.*, a but-for cause." *Id.* at 284 (Kennedy, J., dissenting).

Furthermore, the distinction McDonnell Douglas urges escapes us. Within the context of determining the cause of an employer's decision, the two phrases have been equated, *e.g.*, *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Common sense tells us that if a factor motivates a certain decision, that factor is substantial; conversely, a factor cannot be considered to be substantial unless it motivates (at least in part, which is the entire premise upon which *Price Waterhouse* lies) the ultimate decision. We find no error in the giving or the wording of the mixed-motive instruction.

D. Emotional Distress

McDonnell Douglas contends Glover failed to present sufficient evidence, as required by Missouri law, to sustain the jury's award of $100,000 for emotional distress. We agree and therefore vacate the award.[1]

The federal age discrimination laws do not allow for recovery of damages for emotional distress. *E.g.., Fiedler v. Indianhead Truck Line. Inc.*, 670 F.2d 806, 809-10 (8th Cir. 1982). Any claim for emotional distress damages must, therefore, arise from state law. Glover relies on the Missouri Human Rights Act, Mo. Rev. Stat. § 213.111.2 (1986), which authorizes a court to award actual damages to a prevailing plaintiff. There is not much dispute that Missouri courts view damages arising from emotional distress as actual damages; the dispute is over how Missouri courts require those damages to be proved. In *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (en banc), the Missouri Supreme Court rejected the "impact rule" and held that a plaintiff could recover damages for emotional distress if "the emotional distress or mental injury [is] medically diagnosable and . . . of sufficient severity so as to be medically significant. Former decisions holding to the contrary are no longer to be followed." *Id.* at 772-73 (footnote omitted). Subsequent decisions have interpreted *Bass* to require expert medical testimony when no physical injury is involved. *E.g., Skyles v. Burge*, 830 S.W.2d 497, 500 (Mo. Ct. App. 1992); *Childs v. Williams*, 825 S.W.2d 4, 10 (Mo. Ct. App. 1992); *Van Eaton v. Thon*, 764 S.W.2d 674, 676 (Mo. Ct. App. 1988). Glover failed to present expert medical testimony to support his claim of emotional distress, and therefore the $100,000 award for these damages must be vacated.

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[1] Because of our holding on this issue, we need not address McDonnell Douglas' alternative argument that Missouri law would require this claim be initially submitted to the Missouri Labor and Industrial Relations Commission.

Glover contends *Bass* applies only when emotional distress is an element of the cause of action, such as when the plaintiff alleges either intentional or negligent infliction of emotional distress. He points out that *Bass* involved a claim for negligent infliction of emotional distress and contends *Bass* does not apply when emotional damages simply comprise a part of the damage element of a cause of action. However, nothing in *Bass* contains such a limitation, and it does not appear that Missouri courts have read *Bass* in such a limited way. *E.g., State ex rel. Benz v. Blackwell*, 716 S.W.2d 270, 272-273 (Mo. Ct. App. 1986) (applying *Bass* to cause of action for false return of summons). It thus appears that Missouri courts require expert medical testimony to support a claim of emotional distress whenever physical injuries are not incurred, regardless of whether emotional distress constitutes a substantive element of the cause of action or an element of damages for any other type of action.

E. Willfulness

The ADEA allows for double damages when the employer's violation is willful. *Lee v. Rapid City Area School Dist. No. 51-4*, No. 90-5499, slip op. at 14 (8th Cir. Dec. 3, 1992) (en banc). A violation is willful if the employer either knew his actions violated the ADEA or if the employer recklessly disregarded the possibility that his actions violated the ADEA. *Trans World Airlines. Inc. v. Thurston*, 469 U.S. 111, 128-29 (1985). Because this award of liquidated damages is punitive in nature, *id.* at 125, it must be supported by evidence beyond the minimum necessary to prove the Violation. *Rademaker v. Nebraska*, 906 F.2d 1309, 1313 (8th Cir. 1990); *Bethea v. Levi Strauss & Co.*, 827 F.2d 355, 359 (8th Cir. 1987). The plaintiff cannot meet his burden by proving the employer knew his actions would implicate the ADEA, *Thurston*, 469 U.S. at 127-28, nor will the fact the plaintiff presented direct evidence of discrimination automatically meet this standard. *Williams v. Valentec Kisco. Inc.*, 964 F.2d 723, 729 (8th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3396 (Dec. 1, 1992).

In this case, Glover did (barely) present sufficient evidence to sustain the jury's verdict; however, the evidence does not go beyond establishing a violation of the ADEA. There is simply no evidence that McDonnell Douglas recklessly disregarded the possibility of an ADEA violation, and there is no contention that the company knew its actions were discriminatory. Consequently, there was no evidence upon which the jury's finding of willfulness can rest, so we reverse the jury's finding and vacate the corresponding award.[2]

F. Punitive Damages

The jury awarded Glover punitive damages based on its finding that McDonnell Douglas violated the Missouri Human

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[2] We note the existence of two pending cases that bear on this issue, and take this opportunity to explain why we do not wait for the outcome in those cases. The first of these cases is *Brown v. Stites Concrete Co.*, which is to be heard by this court en banc. 969 F.2d 714 (1992). The now-vacated panel opinion in that case makes clear that the issue involved was centered on the jury instructions on the willfulness claim -- it does not appear that sufficiency of the evidence was an issue. Because we have held that the evidence in this case was insufficient, we do not believe the en banc court's decision regarding the jury instructions in *Brown* will have any impact on this case.

The second case is *Hazen Paper Co. v. Biggins*, a case in which the Supreme Court has granted certiorari. 60 U.S.L.W. 3851 (June 23, 1992). The question presented will require the Court to decide whether, "[i]n view of its consequence of imposing automatic punitive damages in every discriminatory treatment case in which [an] underlying violation of [the ADEA] is found," *Thurston* should continue to apply to individual (as opposed to class-based) claims under the ADEA. *Id.* We believe the Court will do one of two things (and we make no prediction as to which): either continue to apply *Thurston* to individual plaintiffs or impose a higher standard of willfulness for individual plaintiffs; we do not believe the Court will lower the standard already enunciated in *Thurston*. Regardless of the course of action the Court chooses, our decision today will be unaffected; if *Thurston* continues to apply, the law — and our decision — will be unchanged. If a higher standard is imposed, the evidence in this case will be insufficient to meet it, inasmuch as Glover has not even met the *Thurston* standard.

Rights Act. We have previously recognized that the standard for awarding punitive damages under this law requires the employer's conduct to have been " 'outrageous because of [the employer's] evil motive or reckless indifference to the rights of others.' " *Finley v. Empiregas, Inc. of Potosi*, 975 F.2d 467, 472 (8th Cir. 1992) (quoting *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. 1989) (en banc)). Although we construe the evidence in the light most favorable to Glover, *id.*, we find no evidence of evil motive or reckless indifference on McDonnell Douglas' part. Glover argues the award should be upheld because discrimination must be deterred; however, this logic would require that all violations result in punitive damage awards, and this does not correspond with Missouri law. As with the award of double damages under the federal law, the state law requires a showing beyond the minimum necessary to establish the violation. The requisite evidence is not present in this case, and the evidence that is present is not sufficient to sustain the jury's award. Accordingly, we vacate the award of punitive damages.

G. Pension Credit

McDonnell Douglas contends the district court's order granting Glover pension credit from the time of his termination amounts to a double award for Glover. Since his termination, Glover has received pension payments totalling almost $35,000. In ordering that Glover be reinstated, the district court ordered McDonnell Douglas to "make whatever compensatory payments are necessary to enable plaintiff, upon his retirement, to receive benefits as though he had been employed by the defendant continuously since his initial date of hire in 1967 and without any interruption in service related to his unlawful discharge in February 1988." *Glover v. McDonnell Douglas Corp.*, No. 90-0034C(3), slip op. at 7 (E.D. Mo. July 15, 1991) (order granting equitable relief). McDonnell Douglas contends that if Glover is to be "made whole" through reinstatement and the granting of back pay and full pension credit (thereby putting

him in the position as if he had never been unlawfully terminated), the total award should be offset by the pension benefits he has received because he would not have received them but for the termination. In other words, the district court's order puts Glover in a better than whole position; he gets back pay, pension benefits as if he had not been terminated, and the pension benefits he has already received.

Glover contends the district court acted properly because it did not know how the pension plan was funded. Consequently, the district court was faced with a choice of erring in favor of the innocent plaintiff or the company, and chose to risk error in favor of the plaintiff. We do not agree with this characterization. The details of the pension's funding are irrelevant to this issue; regardless of how the plan is funded, the court's order will put Glover in a better position than if he had not been terminated because he will be entitled to full pension payments *plus* the pension payments he has already received. The district court's order thus goes beyond simply making Glover whole, and on remand the district court is instructed to modify its grant of equitable relief to address this over-compensation.

III. CONCLUSION

We affirm the jury's finding of age discrimination and award of backpay. We reverse the jury's finding of willfulness and vacate the corresponding awards, as well as the awards for punitive and emotional damages. Finally, we remand to the district court so that it may modify its grant of equitable relief consistent with part II.G of this opinion .

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 91-2581 and 91-3057

Fred Brown,
Appellee/Cross-Appellant,

v.

Stites Concrete, Inc.,
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

[PUBLISHED]

Submitted: January 11, 1993
Filed: June 10, 1993

Before RICHARD S. ARNOLD, Chief Judge, BRIGHT, Senior Circuit Judge, MCMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges, En Banc.

HANSEN, Circuit Judge.

Fred Brown brought this age discrimination action against Stites Concrete, Inc. (Stites) pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. The jury found in favor of Brown and awarded $38,500 in compensatory damages. Based upon the jury's finding of willfulness, the district court[1] doubled the award pursuant to 29 U.S.C. § 626(b). The district court also awarded Brown $28,089 in attorney's fees.

[1] The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

On appeal to a panel of this court, Stites argued that the district court erred in denying its motion for judgment notwithstanding the verdict or for a new trial and challenged the jury instructions given on willfulness and mitigation. Brown cross-appealed on the issue of attorney's fees. In *Brown v. Stites Concrete. Inc.*, Nos. 91-2581, 91-3057, 91-3139 (8th Cir. July 15, 1992), the panel affirmed the district court on all issues. Stites then filed a suggestion for rehearing en banc on the following issue:

> The trial court erred in instructing the jury on the issue of willful conduct in that the instruction given encouraged a finding of willfulness in every case and did not require a finding of evidence beyond that needed for compensatory damage.

See appellant's suggestion for rehearing en banc, filed July 29, 1992, at i. On September 14, 1992, we granted Stites's suggestion for rehearing en banc and vacated the opinion and judgment filed by the panel.

I.

As a preliminary matter, we must determine which issue or issues are before the court en banc. Stites, based on its counsel's professional judgment, appropriately limited its suggestion for rehearing en banc to the one issue that it believed satisfied the rigid standards of Federal Rule of Appellate Procedure 35(a) and Eighth Circuit Rule 35A(a): whether the panel decision affirming the district court on the question regarding the jury instruction on willfulness is contrary to prior decisions of this court. *See* 8th Cir. R. 35A(c)(2)(i). That single issue is clearly before this court en banc. Upon granting the suggestion for rehearing en banc, however, we vacated the panel decision in its entirety rather than vacating only the portion of the panel decision regarding the instruction on willfulness. Therefore, although only the issue regarding the jury instruction on willfulness was properly preserved for en banc consideration, all issues origi-

nally on appeal technically remain open because the panel opinion was vacated in its entirety.

It has long been the policy of this court that we do not consider issues en banc that are not specifically raised in the suggestion for en banc consideration. Only in the rarest of occasions, when justice requires, do we depart from this policy. Rehearing en banc is appropriate "only when the attention of the entire court must be directed to an issue of grave constitutional dimension or exceptional public importance, or to an opinion that directly conflicts with Supreme Court or Eighth Circuit precedent." 8th Cir. R. 35A(a).

Because we see no reason to depart from our policy in this case, we will discuss only the issue regarding the jury instruction on willfulness because that was the sole basis upon which the suggestion for rehearing en banc was granted. Therefore, we reinstate the panel opinion to the extent it resolves the other issues raised on initial appeal but leave vacated that portion of the opinion addressing the issue regarding the jury instruction on willfulness.[2] The original panel opinion is appended to this opinion .

II.

The issue on which en banc consideration was granted is essentially a legal one. The reinstated panel opinion thoroughly discusses the facts. Therefore, we only summarize the factual background for this opinion.

Brown was employed by Stites as a mechanic for a period of approximately seven years, beginning in 1968. In July of 1986, Brown, at the age of seventy-five, approached Dale Stites, the

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[2] Consequently, the only portion of the majority panel opinion that remains vacated is the first six paragraphs in section II.B. *See Brown v. Stites Concrete. Inc.*, Nos. 91-2581, 91-3057, 91-3139, slip op. at 7-9 (8th Cir. July 15, 1992).

president and owner of Stites, and asked to work for Stites Concrete again. Brown testified that he told Dale Stites that he "always went to Florida for two or three months out of the year" after the first of the year and that Dale Stites responded, "There's no problem. We're not busy at that time of the year." The following Monday, Brown began working part-time in the maintenance department, and within a few weeks, he was working full-time and then overtime. Shortly after Brown was hired, Stites also hired Steve Hyslop, who was thirty-five years old and less experienced than Brown, to work in the maintenance department.

In 1987, an engine block fell on Brown while at work, resulting in a hernia that required surgery. Brown missed approximately ten weeks of work. Hyslop testified that after Brown's injury, Dale Stites began making statements about Brown's age and his ability to perform his duties.

In December of 1987, Brown asked for a leave of absence from the first of January 1988 until the first of April 1988. According to Brown's testimony, Dale Stites responded by stating "no problem." Brown further testified that on the day he left, Dale Stites shook his hand and said, "Have a good trip, a good vacation, and I'll see you the first day of April." Upon returning from his trip, Brown returned to Stites Concrete but was told that there was no work and that they would call him. Steve Hyslop, who had less seniority than Brown, was working at this time and testified that he thought there was more than enough work for two people. Stites never called Brown back to work. The union steward, Tom Morlan, testified that he spoke to Dale Stites upon Brown's request and that Dale Stites told him that "there wasn't a problem. . . . Fred's getting too old to work out there. I'm afraid he might get hurt."

After a two-day trial, the jury returned a verdict for Brown, awarded $38,500 in compensatory damages, and found that

Stites had willfully violated the ADEA. Upon the jury's finding of willfulness, the district court awarded liquidated damages pursuant to 29 U.S.C. § 626(b).

III.

Stites argues that the district court erred in its willfulness instruction because the instruction did not require additional evidence beyond that needed for compensatory damages and it encouraged a finding of willfulness in every case that a violation of the ADEA was found. After the oral arguments before this court en banc, the United States Supreme Court has addressed the issue of "willfulness" in an ADEA case and has overruled some Eighth Circuit case law on the topic. Therefore, we find it useful to review the development of the applicable law on this issue before we address the jury instruction in dispute in this case.

A.

The ADEA provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. § 626(b). In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), the Supreme Court held that an employer's violation of the ADEA is "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 128-29. The Court rejected the argument that a violation of the ADEA is willful if the employer "simply knew of the potential applicability of the ADEA." *Id.* at 127. The Court went on to explain:

> [T]he broad standard proposed by the respondents would result in an award of double damages in almost every case. As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that

> Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent.

Id. at 128 (footnote omitted).

This circuit, as well as several others, has tried to apply the *Thurston* standard in a manner that would ensure a two-tiered liability scheme. In *Neufeld v. Searle Laboratories*, 884 F.2d 335 (8th Cir. 1989), this court stated:

> We think *Thurston* means at least this: if the people making the employment decision know that age discrimination is unlawful, and if there is direct evidence — more than just an inference from, say, an arguably pretextual justification — of age-based animus, the trier of fact may properly find willfulness.

Id. at 340. Since *Neufeld*, this court has consistently required direct evidence rather than inference to support a finding of "willfulness." *See, e.g., Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 396 (8th Cir. 1992); *Hudson v. Normandy Sch. Dist.*, 953 F.2d 410, 413 (8th Cir. 1992); *Beshears v. Asbill*, 930 F.2d 1348, 1356 (8th Cir. 1991); *Morgan v. Arkansas Gazette*, 897 F.2d 945, 952 (8th Cir. 1990) (more than inference from arguable pretextual justification required in disparate treatment cases);[3] *Blake v. J.C. Penney. Co.*, 894 F.2d 274, 280 (8th Cir.

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[3] In formulating the direct evidence requirement in *Neufeld*, this court characterized *Thurston* as a disparate-impact case and noted that the "chief difficulty in transposing *Thurston* into the disparate-treatment context is that disparate-treatment claims involve charges of specific bias focused against a particular victim." *Neufeld*, 884 F.2d at 340; *see also Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 471 (8th Cir. 1989) (expressing same concerns in applying *Thurston* to a disparate treatment ADEA case). In *Hazen Paper Co. v. Biggins*, 61 U.S.L.W. 4323 (U.S. Apr. 20, 1993), the Supreme Court characterized *Thurston* as a disparate treatment case. *See id.* at 4325. In comparing

(Footnote 3 continued on next page)

1990). Also in addressing the same concern for a two-tiered system, this court in *Bethea v. Levi Strauss & Co.*, 827 F.2d 355 (8th Cir. 1987), quoted — but did not adopt — the requirement imposed by the Court of Appeals for the Third Circuit that liquidated damages in an informal disparate treatment case could not be found unless the employer's conduct was "outrageous." *Id.* at 359 (quoting *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 657 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987)).

Recently, in *Hazen Paper Co. v. Biggins*, 61 U.S.L.W. 4323 (U.S. Apr. 20, 1993), the Supreme Court found the concern for maintaining a two-tiered liability scheme to be "misplaced." *Id.* at 4327. The Court stated:

> The ADEA does not provide for liquidated damages "where consistent with the principle of a two-tiered liability scheme." It provides for liquidated damages where the violation was "willful." That definition must be applied here unless we overrule *Thurston*, or unless there is some inherent difference between this case and *Thurston* to cause a shift in the meaning of the word "willful."

Id. at 4327. The Court declined to overrule *Thurston* and did not find the case before it distinguishable from *Thurston*. *Id.* *Biggins* reaffirmed that the *Thurston* standard for willfulness applicable in all disparate treatment cases under the ADEA is simply whether "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* The Court held that "[o]nce a 'willful' violation has been shown, the employee need not additionally demonstrate

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(Footnote 3 continued)

disparate treatment cases, the Court stated that the discrimination in *Thurston* entered the employment decision through a formal policy rather than informally and on an ad hoc basis as in cases such as *Neufeld*. *Biggins*, 61 U.S.L.W. at 4326. The Court further noted that it has "never decided whether a disparate impact theory of liability is available under the ADEA." *Id.* at 4325.

that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation . . . ." *Id.*

B.

We review jury instructions as a whole to determine whether they fairly and adequately instruct the jury as to the substantive law. *Tioga Pub. Sch. Dist. v. United States Gypsum Co.*, 984 F.2d 915, 923-24 (8th Cir. 1993) (citation omitted). The district court has wide discretion in the formulation of jury instructions. *Davis v. Merrill Lynch, Pierce. Fenner & Smith*, 906 F.2d 1206, 1212 (8th Cir. 1990) (citation omitted).

Stites argues that the instruction given by the district court fails to require additional evidence and results in a finding of willfulness in every case that a violation of the ADEA is found. Stites contends that its proposed instruction was correct and should have been used instead.

Stites's proposed instruction included the sentence, "A violation is willful if, in addition to the facts you have used to find discrimination, there is some additional evidence of outrageous conduct." The aspect of Stites's argument that the instruction should have required evidence of outrageous conduct is now foreclosed by *Biggins*. *Biggins*, 61 U.S.L.W. at 4327 (rejecting an "outrageousness" requirement). Aside from the "outrageousness" requirement, Stites's proposed instruction also required "additional evidence" to support a finding of willfulness. Beginning with the decision in Bethea v. Levi Strauss & Co., 827 F.2d 355, 359 (8th Cir. 1987), this court has required additional evidence to establish a willfulness violation. *See, e.g., Glover*, 981 F.2d at 395-96 (liquidated damages award must be supported by evidence beyond the minimum necessary to prove the violation); *Reyher v. Champion Int'l Corp.*, 975 F.2d 483, 487 (8th Cir. 1992) (requiring "an additional quantum of evidence," but determination may be from "same nucleus of operative fact"); *Williams v. Valentec Kisco Inc.*, 964 F.2d 723, 729 (8th

Cir. 1992) (requiring additional evidence); *Rademaker v. Nebraska*, 906 F.2d 1309, 1313 (8th Cir. 1990) (same); *Morgan*, 897 F.2d at 952 (same). In formulating this requirement, we stated:

> "Because *Thurston* makes clear that we must interpret the liquidated damages provisions in a way that would not permit 'an award of double damages in almost every case,' *Thurston*, 469 U.S. at 128, we must seek a standard for willfulness that distinguishes between a violation, which is almost always intentional, and a willful violation, leading to double damages." *Dreyer [v. Arco Chem. Co.*, 801 F.2d 651, 657 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987).] The *Thurston* Court looked to the legislative history of the ADEA which indicated that "Congress intended for liquidated damages to be punitive in nature." *Thurston*, 469 U.S. at 125. In its analysis of the *Thurston* standard of willfulness, one court concluded that "[t]he essence of punitive damages is that they may be awarded 'for conduct that is *outrageous*."' *Dreyer*, 801 F.2d at 657 (citation omitted). Thus, in order that the liquidated damages be based on evidence that does not simply duplicate that needed for the compensatory damages, there must be some additional evidence of the employer's "reckless disregard." *Thurston*, 469 U.S. at 128.

Bethea, 827 F.2d at 359.

The rationale we expressed in *Bethea* has been severely undercut by the decision in *Biggins*. As noted above, the Third Circuit's requirement in *Dreyer* that the conduct of the employer be "outrageous" before liquidated damages could be imposed has been overruled. *Biggins*, 61 U.S.L.W. at 4327. More importantly, the Supreme Court has clarified that the concern for ensuring a two-tiered liability scheme is "misplaced" and that the focus should strictly be on whether the employer's actions

were in willful violation of the ADEA as provided in the statute. To support an award for liquidated damages, therefore, the sole relevant determination is whether the evidence meets the standard that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." The question is not whether the evidence used to establish willfulness is different from and additional to the evidence used to establish a violation of the ADEA, but whether the evidence — additional or otherwise — satisfies the distinct standard used for establishing willfulness. Accordingly, we reject Stites's argument that the jury instruction in this case is flawed because it did not require "additional evidence" to establish willfulness.

The jury instruction given by the district court in this case stated:

> [A] violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the federal law under which the plaintiff sues in this case. And the violation is willful if it's done voluntarily and deliberately and intentionally and not by accident or inadvertence or ordinary negligence. And, in this connection, you can consider statements made or acts done or omitted and all facts or circumstances which show whether or not the defendant acted intentionally and not by accident.

Trial transcript, at 444-45.

The first sentence of the instruction given by the district court correctly states the "willfulness" standard as set forth in *Thurston* and reaffirmed in *Biggins*. We suggest that an instruction that sets forth the standard on willfulness alone is ordinarily sufficient. *See, e.g.*, Instruction No. 5.14, Eighth Circuit Model Civil Jury Instructions (West 1993). The jury instruction given by the

district court, however, followed the statement of the willfulness standard by two more sentences.

The second sentence distinguishes willful violations from violations done "by accident or inadvertence or ordinary negligence." This distinction is not inconsistent with the proper standard for willfulness. *See Biggins*, 61 U.S.L.W. at 4326 ("The word 'willful' . . . is generally understood to refer to conduct that is not merely negligent.") (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (a Fair Labor Standards Act case)); *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1061 (8th Cir. 1988). The first portion of the second sentence is problematic, however, principally because it equates "willfully" with "voluntarily" in the ADEA context when it is a willful violation of the law as opposed to voluntary conduct in general that is required. This problem could have been avoided if the instruction simply stated that a willful violation of the statute cannot occur by accident, inadvertence, or ordinary negligence. When read in context of the whole instruction, we find that portion of the second sentence as given was not reversible error because the instruction as a whole fairly and adequately instructed the jury as to the substantive law.

The last sentence instructs that the jury can "consider statements made or acts done or omitted and all facts or circumstances." This statement fairly and adequately states the law because, as discussed above, neither direct evidence nor additional evidence is required to establish willfulness. Once again, the focus is not on the type or source of the evidence but rather on whether the evidence meets the standard for willfulness.

Because we find that the instruction fairly and adequately states the law as set forth in *Thurston* and reaffirmed in *Biggins*, we reject Stites's argument that the instruction given directs a finding of willfulness every time a violation of the ADEA is found.

> It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a "bona fide occupational qualification" defense . . . and exempts certain subject matters and persons . . . . If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.

Biggins, 61 U.S.L.W. at 4327 (citations omitted). Accordingly, we hold that the district court did not abuse its discretion in the formulation of the jury instruction on willfulness.

IV.

For the reasons above, we find that the district court did not abuse its discretion in its formulation of the jury instruction on willfulness. We reinstate the panel decision to the extent that it resolves all issues other than the issue regarding the instruction on "willfulness" under the ADEA. The judgment of the district court is affirmed.

BEAM, Circuit Judge, concurring specially.

I concur in the opinion prepared for the majority although under the evidence and the *Thurston* test, the issue of "willfulness" is an extremely close question. I write separately to state that we should direct the district courts to use language similar to that found in Instruction No. 5.14, Eighth Circuit Model Civil Jury Instructions, nothing more. Attempts to help the jury better understand the meaning of willfulness in the two-tiered concept inherent in the ADEA tend to confuse rather than enlighten. This is because we generally try to use criminal law concepts and these ideas do not readily transfer to issues raised in civil litigation under the ADEA.

LOKEN, Circuit Judge, with whom WOLLMAN and MAGILL, Circuit Judges, join, dissenting.

I agree with the court's interpretation of *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993). But I disagree that the liquidated damages instruction given in this case meets the standard adopted in *Trans World Airlines Inc. v. Thurston*, 469 U.S. 111 (1985), and followed in *Biggins*. In my view, the instruction given was reversible error under *Thurston* and remains reversible error under *Biggins*. Therefore, I respectfully dissent.

The *Thurston* standard — whether the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA," 469 U.S. at 128 — focuses not on whether the employer's *conduct* was willful, but on whether the *violation* was willful. We have frequently recognized this vital distinction. *See MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1061 (8th Cir. 1988) (willful violation requires "conscious intent to violate the law"); *Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 471 (8th Cir. 1989) (same); *Morgan v. Arkansas Gazette*, 897 F.2d 945, 952 (8th Cir. 1990) (same); *Hudson v. Normandy School Dist.*, 953 F.2d 410, 413 (8th Cir. 1992) (employer "must either willfully, knowingly or recklessly violate the ADEA to be liable for liquidated damages").

Viewed from this critical perspective, the instruction given in this case consisted of three inconsistent and therefore seriously misleading sentences. The first sentence was right out of *Thurston* and, after *Biggins*, was clearly a correct statement of the law:

> [A] violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the federal law under which the plaintiff sues in this case.

The problem begins in the second sentence:

> And the violation is willful if it's done voluntarily and deliberately and intentionally and not by accident or inadvertence or ordinary negligence.

The focus of this sentence is still properly on whether the violation is willful. But, as the court admits, insertion of the word *voluntarily* was wrong. It was wrong because *voluntary* is an impermissible substitute for *reckless disregard* in the *Thurston* standard. It was also wrong because the phrase *if it's done voluntarily* subtly shifted the focus from the nature of the employer's violation to the nature of its conduct. And this subtle shift in the second sentence became a completed transition in the third sentence:

> And, in this connection, you can consider statements made or acts done or omitted and all facts or circumstances which show whether or not the defendant *acted* intentionally and not by accident.

(Emphasis added.) By the end of this sentence, the jury has received precisely the invitation that *Thurston* prohibits — you may find a willful violation if the defendant acted intentionally.

To find prejudice from this erroneous dilution of the *Thurston* standard, one need look no further than the closing arguments to the jury. The court's instructions were distributed to counsel prior to closing arguments. Knowing that the liquidated damages instruction would obscure this crucial distinction, counsel for Brown made sure that the jury would improperly equate Stites's intentional conduct with a willful violation:

> Ladies and gentlemen, that is an intentional, willful act. It's a decision made deliberately. It's a decision made knowingly and intentionally. Clearly, Dale Stites thought about this decision. He began to think about it in the summertime when Fred had his accident. He thought about it through the fall when Fred came back to work. He thought

about it while Fred was gone. And when he finally took action, it was deliberate action, intentional action, and, I suggest to you, a willful violation of the law passed by Congress to forbid just that kind of conduct.

In *Thurston*, the Supreme Court reversed an award of liquidated damages because "[t]he record makes clear that [the employer] acted reasonably and in good faith." 469 U.S. at 129. Here, Stites hired Brown when he was seventy-five years old and discharged him two years later after Brown had been seriously injured on the job and had taken a long winter vacation. Not surprisingly, there was evidence that Brown's age was a factor in the decision to discharge him, but there was also considerable evidence that this was a reasonable, good faith employment decision rather than an intentional or reckless violation of ADEA. *Biggins* confirmed that, "It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA." 113 S. Ct. at 1709. The district court's instruction failed to properly define this issue for the jury. I would remand for a new trial on the issue of liquidated damages.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.